

(2011) 09 DEL CK 0155

Delhi High Court

Case No: Writ Petition (C) 7024 of 2011

KLA India Public Ltd.

APPELLANT

Vs

Export Credit Guarantee
Corporation of India Ltd. and
Another

RESPONDENT

Date of Decision: Sept. 23, 2011

Acts Referred:

- Constitution of India, 1950 - Article 226

Citation: (2011) 183 DLT 591

Hon'ble Judges: Rajiv Sahai Endlaw, J

Bench: Single Bench

Advocate: Rajeev Nayar, Diwakar Maheshwari and Ankur Khandelwal, for the Appellant; Himanshu Bajaj, Karan Bindra, Sandeep Bajaj and Gurpreet S. Parwanda for R-2, for the Respondent

Final Decision: Dismissed

Judgement

Rajiv Sahai Endlaw, J.

The petition impugns the rejection by the Respondent No. 1 Export Credit Guarantee Corporation of India Ltd. (ECGC) of the claim of the Petitioner under an insurance policy obtained from the Respondent No. 1 ECGC. The petition effectively seeks mandamus to the Respondent No. 1 ECGC to pay the insurance claim of the Petitioner, with [ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others](#), forming the anchor of the claim of the Petitioner.

2. The Apex Court recently in [Abbas Ahmad Choudhary Vs. State of Assam](#), after a consideration of the entire case law including Suganmal v. State of Madhya Pradesh AIR 1965 SC 1741 , [U.P. Pollution Control Board and Others Vs. Kanoria Industrial Ltd. and Another](#), and ABL International Ltd. (supra), made the legal proposition

clear as under:

(i) Normally, a petition under Article 226 of the Constitution of India will not be entertained to enforce a civil liability arising out of a breach of contract or a tort to pay an amount of money due to the claimants. The aggrieved party will have to agitate the question in a civil suit. But an order for payment of money may be made in a writ proceeding, in enforcement of statutory functions of the State or its officers;

(ii) If a right has been infringed-whether a fundamental right or a statutory right and the aggrieved party comes to the Court for enforcement of the right, it will not be giving complete relief if the Court merely declares the existence of such right or the fact that existing right has been infringed. The High Court, while enforcing fundamental or statutory rights, has the power to give consequential relief by ordering payment of money realized by the Government without the authority of law;

(iii) A petition for issue of writ of mandamus will not normally be entertained for the purpose of merely ordering a refund of money, to the return of which the Petitioner claims a right. The aggrieved party seeking refund has to approach the Civil Court for claiming the amount, though the High Courts have the power to pass appropriate orders in the exercise of powers conferred under Article 226 for payment of money;

(iv) There is a distinction between cases where a claimant approaches the High Court seeking the relief of obtaining only refund and those where refund is sought as a consequential relief after striking down the order of assessment etc. While a petition praying for mere issue of writ of mandamus to the State to refund the money alleged to have been illegally collected is not ordinarily maintainable, if the allegation is that the assessment was without a jurisdiction and the tax collected was without authority of law and therefore the Respondents had no authority to retain the money collected without any authority of law, the High Court has the power to direct refund in a writ petition.

(v) It is one thing to say that the High Court has no power under Article 226 to issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. For instance, where the facts are not in dispute, where the collection of money was without authority of law, there is no good reason to deny a relief of refund to the citizens.

(vi) Where the lis has a public law character or involves a question arising out of public law functions on the part of the State or its authorities, access to justice by way of a public law remedy will not be denied.

3. In my view, the present case does not fall in any of the categories enumerated hereinabove. As far as reliance on ABL International Ltd. is concerned, a reading of the said judgment shows that the Court on a perusal of the facts therein found no question which required any oral evidence and found the dispute in that case to be only as to the interpretation of the various clauses of the policy subject matter of that petition. However it is not so here. The senior counsel for the Petitioner has contended that the writ remedy would lie because of the inconsistent stands taken by the Respondent No. 1 ECGC from time to time. It is stated that as many as nine different reasons have been stated from time to time for rejecting the claim of the Petitioner. It is contended that the same shows the rejection to be mala fide.

4. However merely because different reasons have been stated from time to time for rejecting the claim, would not mean that the dispute in the present case also is purely as to the interpretation of the terms of a contract. The question of mala fide also is a question of fact which cannot be adjudicated in writ jurisdiction. It was held in [D.D. Suri Vs. A.K. Barren and Others](#), that even where substance in the allegation of mala fide is found, the proper course in a given case may still be to seek relief by way of a suit if several disputed questions of fact are required to be adjudicated.

5. A perusal of the letter dated 27th December, 2010 of the Respondent No. 1 ECGC to the Petitioner shows that the claim of the Petitioner was rejected for the reason of the foreign buyer having raised quality dispute, as the foreign buyer under the contract with the Petitioner was entitled to raise and that the Petitioner delayed joint taking of the sample and the test got done showed the goods to be not of the quality as claimed; it was thus the case of the Respondent no1. ECGC that these developments had not been revealed by the Petitioner to the Respondent No. 1 ECGC and the Petitioner went ahead with shipment after agreeing to an amendment of the contract with the buyer; it is the case of the Respondent No. 1 ECGC that owing to the amendment so carried out, no claim under the policy was maintainable.

6. The Respondent No. 1 ECGC in its letter dated 21st March, 2011 also stated that the discrepancies in the document was not among the risks covered under the policy and since non-payment of the bills was owing to discrepancy cited by the Letter of Credit opening Bank, no claim under the policy was maintainable.

7. The Respondent No. 1 ECGC in its letter dated 5th April, 2011 again cited the reasons of existence of a dispute over quality and other aspects of contract for being not liable under the policy.

8. I may also notice that the policy on the basis of which the Petitioner claims, in Clause 20 of Part II (Terms & Conditions) thereof provides for the exclusive power of the Courts at Mumbai or at the place or issue specified in the Schedule to the policy. It is not the plea of the Petitioner in the petition that the policy was issued within the territorial jurisdiction of this Court; rather it appears to be issued at Moradabad.

Thus the said aspect may also arise for consideration.

9. The Supreme Court in [Jagdish Mandal Vs. State of Orissa and Others](#), held that the power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest or to decide contractual disputes. It was also held that a writ petition in the contractual matters would be entertained only if there is an element of public interest in the litigation. No such element of public interest is found in the instant case.

10. Recently, the Apex Court in [Kisan Sahkari Chini Mills Ltd. and Others Vs. Vardan Linkers and Others](#), also reiterated that public law remedy under Article 226 of the Constitution of India is not available to seek damages for breach of contract or specific performance of contract unless the contractual dispute has a public law element. Reference may also be made to [Binny Ltd. and Another Vs. V. Sadasivan and Others](#), where the Apex Court held that even in the matter of termination of employment, no public law element is involved and the remedy of the employees is under the civil or labour law only. It was further held that the powers under Article 226 are to be exercised by applying the Constitutional provisions and judicial guidelines and violation, if any of the fundamental rights and the Court would be reluctant to exercise the power of judicial review in rights on the basis of contracts. It was further held that a contract would not become statutory simply because it has been awarded by a statutory body.

11. I am also of the opinion that the contractual claim of the Petitioner requires the Petitioner to prove the loss which was insured. Without the loss being proved, the Petitioner cannot succeed in a claim under an insurance policy.

12. The senior counsel for the Petitioner has of course contended that the Respondent No. 1 ECGC has in none of the nine reasons given for rejection, disputed the quantum of the loss. He thus contends that the loss as claimed by the Petitioner should be deemed to be admitted. In my view, without an admission, the loss would be required to be proved.

13. The writ petition is therefore dismissed as not maintainable with liberty to the Petitioner to avail the alternative remedies available aforesaid. No order as to costs.

CM No. 16067/2011 (for exemption)

Allowed, subject to just exceptions.